In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 214

GILCREASE OIL COMPANY,

Petitioner,

v.

G. M. COSBY *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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To the Supreme Court of the United States and the Honorable Judges Thereof:

The petitioner, Gilcrease Oil Company, respectfully prays this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons hereinafter set out.

JUDGMENT BELOW

The judgment sought to be reviewed was entered January 20, 1943, and appears at page 529 of the Record.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, plaintiff in the trial court, sought to recover from respondents 7/8ths of the minerals under a strip of land 48 feet on the east, 41 feet on the west and 1,798 feet from east to west, containing approximately two acres, the suit being a Texas trespass to try title suit to fix boundary.

There were two original surveys, the Hathaway on the north and the Castleberry adjoining on the south, the southeast corner of the Hathaway being the northeast corner of the Castleberry, and the south boundary line of the Hathaway being the north boundary line of the Castleberry. Arthur Christian owned a tract of approximately 100 acres which occupied the east end of the Hathaway Survey. One Thad Snoddy owned a tract of 50 acres in the northeast corner of the Castleberry Survey. Arthur Christian conveyed 7/8ths of the minerals within and under his tract by an instrument which after reciting field notes calling for original survey lines contains the following additional description:

> "This being the same land deeded to us by J. M. Farmer et ux. by deed recorded in Vol. 38, page 189 of the Deed Records of Gregg County, except 3 acres sold to the Colored School and church there being 100 acres of land, more or less, in said tract purchased from J. M. Farmer but in a recent survey, there was found to be 107 acres of land, more or less.
>
> "It is intended herein to convey in this lease all the land we own in the above survey save and except 25 acres sold off of the N. W. corner of Earl Christian, deed recorded in Gregg County Records. It being the

> intention to include all land owned or claimed by Lessor in said survey or surveys. * * * (R. 524.)

Petitioner came into possession of the southeast 31 acres by mesne conveyance under Arthur Christian on which it drilled 11 producing oil wells.

There was pointed out to petitioner at the time it purchased as the south boundary line of the Arthur Christian tract an old hedge row fence, which petitioner always considered as its south line, no other boundary line being visible and any other fence having been removed at the beginning of the East Texas oil boom before petitioner purchased its tract (R. 177-178) and which is the line contended for by petitioner as the south line of its tract. (R. 2.)

About five years after the execution of the conveyance under which petitioner holds, one Beavers, a surveyor, purported to resurvey the line between the Hathaway and Cattleberry Surveys. He contended that the line as he found it ran north of the old hedge row fence at such distance as to cut off the strip sued for by petitioner. (R. 525.) On that assumption, five years after the date of petitioner's lease, he obtained a lease from the same Arthur Christian under which petitioner holds, which is the lease under which respondents now hold, and which lease (R. 525) gives as its south line the following description:

> "Thence following *a fence on the North line of Thad Snoddy 50-acre tract*, as follows, 88° 07′ E. 274 feet; S. 87° 43′ E. 400 feet; East 500 feet; N. 81° 58′ E. 128.3 feet; East 473 feet, to a stake the southeast corner of this tract; * * *" (Italics ours.)

which description when fitted to the ground is found to be the old hedge row fence (R. 82, 100) and is the line con-

tended for by petitioner as the south line of its tract. (R. 2.) Respondents later obtained quit-claims under Thad Snoddy, using the same field notes describing the Thad Snoddy north line as being the same fence. (R. 367.)

Thus all of respondents' title papers under Christian, as well as under Snoddy, described the north line of the Snoddy tract, which was the south line of the Christian, as contended for by petitioner (R. 2) which was the old hedge row fence.

Respondents then applied to the State Railroad Commission for, and obtained, permits to drill three wells on the narrow strip. Petitioner, among the 11 wells on its land, drilled three of them offsetting the three wells drilled by respondents. Petitioner did not appear before the Railroad Commission to set up its title but elected to assert its title in court, thus the beginning of this suit.

Respondents' pleadings also pleaded the same line between the Christian and Snoddy tracts (R. 23), which when fitted to the ground is found to be the old hedge row fence, which petitioner claims as the south boundary of its lease. (R. 2.)

Respondents claimed under both the Arthur Christian title and the Snoddy quit-claims. The lower court found both. (R. 504-6.)

The land involved is in the heart of the East Texas Oil Field, and producing wells were thickly drilled in every direction when respondents "discovered" this strip and sought to drill oil wells on it. Respondents' knowledge of the title and conditions was at least equal, if not superior, to petitioners. (R. 297-311.)

Petitioner submits that the above are the controlling facts. Thus the decision becomes a question of law and not a question of fact allowing the strip to be located otherwise than described in all of the instruments under which respondents hold, as well as their pleadings, all of which describe the same line as contended for by petitioner. (R. 2.)

An oil lease under the Texas law after production is proved, is a conveyance, hence the word "conveyance" is used interchangeably for the word "lease." The mineral estate it conveys is "land" and not personal property. Hence, we have herein used the words "lease", "conveyance", and "deed" interchangeably.

At the trial in the court below respondents admitted that the Beavers' line (which is the line called for in petitioner's complaint as the north line of the strip, R. 3) was too far north and contended (R. 214), and the court found, that it was a line supposed to mark the position of a fence torn down since the oil boom in East Texas and which former fence line intersected the west boundary of the strip about ten feet from its northwest corner and ran along slightly north of the three wells drilled by respondents and extended to the southeast corner of the strip. (R. 214.) Thus leaving outside of the land claimed by respondents but within the strip sued for by petitioner a tract containing something more than one-half of the strip sued for, being 10 feet wide on the west, 48 feet wide on the east and lying along the entire length of the strip sued for. The line so claimed by respondents as found by the court being described in the lower court's Finding of Fact No. 12 (R. 509) being:

"Begin at a 19" Sweet gum marked 'X' on N. & W. faces (pt. 'A' on Exhibit), Thence with Arthur Christian's old fence line, N. 89 deg. W. at 730 ft. pass 10.8 ft. North of oil well No. A-2 Cosby & Croley, at 789 ft. a 25" Sweet gum three old hacks on N. face and old wire in N. face, N. 89 deg. 40 W. 500 ft. to point in old fence line, N. 87 deg. 09 W. at 106 ft. pass 14 ft. N. of oil well No. 1 Cosby & Croley, at 383 ft. pass 26.2 ft. N. of oil well No. 3 Cosby & Croley, at 502 ft. point at S. E. C. Pine Hill Christian Church tract (as fenced, 1931) said point being S. 89 deg. 45' E. 5123 ft. and S. 89 deg. 33 E. 178.9 ft. from large standing Red Oak at corner of Bass to Rucker."

The lower court then found in its Conclusion of Law No. 2 (R. 511), that petitioner (plaintiff in the court below) had satisfied the burden of proof with reference to the land north of said line, the court continuing as follows:

"* * * but that plaintiff (petitioner) has satisfied the burden of proof and is entitled to the oil and gas mineral lease estate in and under and pertaining to the land North of said fence line herein described upon which none of the wells drilled by defendants (respondents) are situated." (R. 511.)

Notwithstanding, the lower court rendered judgment (R. 513) that petitioner "take nothing * * * and said defendants (respondents) and each of them go hence without day, fully, finally and forever acquitted of all claims of plaintiff (petitioner.)

Under Appendix is attached a map or plat for the convenience of the court illustrating the controlling facts as briefly stated herein.

QUESTIONS PRESENTED

Briefly stated, the questions herein presented are these:

(1) Whether or not under local Texas rules, when respondents claim under a deed from petitioner's grantor describing the south boundary of grantor's tract of land as contended for by petitioner when coupled with quit-claims from the owner of the adjoining tract containing recitals calling for the same line as the boundary of the adjoining tract, such recitals are available to petitioner to prove boundary of its tract.

(2) Whether or not petitioner is estopped under the Texas rule to claim its land because it elected not to appear and set up title before the State Railroad Commission when respondents applied for permits, the petitioner having drilled some of its wells on the remainder of its land as offsets to the wells drilled by respondents, and later instituted suit in Federal District Court for title and possession of its land, respondents having at least equal, if not superior, knowledge of the title.

(3) Whether or not when petitioner sues for a tract of land and respondent only claims half of the land sued for and the trial court finds that petitioner has established by a preponderance of the evidence its right to title and possession of half, judgment can be rendered against petitioner for the whole tract, including the half to which petitioner has proved right to title and possession.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Petitioner urges three reasons for the granting of the petition in this case, the first two being upon the ground

that the Circuit Court of Appeals has decided important questions of local law in conflict with applicable local Texas decisions and, third, that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and/or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision.

(1) The decision of the Circuit Court of Appeals in the instant case holding that under the Texas rule recitals in deeds from petitioner's grantor describing the boundary line between the Christian and Snoddy tract as contended for by petitioner when coupled with recitals in the quit-claim from the owner of the adjoining tract also describing the boundary between the two tracts as contended for by petitioner are unavailable to petitioner to prove the boundary of its tract is in conflict with the decision of the Supreme Court of the State of Texas in the case of *McBride et al. v. Loomis* (Tex. Sup.), 212 S W. 480.

This is a question of great and far-reaching importance. When cheap land suddenly becomes of great value, the boundaries are the subject of frequent litigation and the recitals in the deeds become very important in settling such litigation. Before litigation is actually instituted, the parties do not know on what question the title will turn and the recitals in the deeds are likely to speak the truth. The question of whether or not they estop those making them and their privies is of great importance. To illustrate the frequency of such litigation, this is the third time this land has been before the Federal Court attempting to take a strip off this same Arthur Christian lease, under which petitioner holds. The decisions in the other two cases are

Ballard v. Stanolind Oil & Gas Company (5th Cir.), 80 F. (2d) 588, and *Doyle et al. v. Stanolind Oil & Gas Company et al.* (5th Cir.), 123 F. (2d) 900; opinion in District Court in same case, 30 Fed. Supp. 893.

(2) The decision of the Circuit Court of Appeals in the instant case holding that petitioner is estopped to claim its land, respondents having equal, if not superior, knowledge of the title, because it did not appear and set up its title before the State Railroad Commission when respondents applied for permit and having drilled three of its eleven wells as offsets to the three wells drilled by appellants on the strip and elected to try out its title in court which is the origin of this suit, is in conflict with the recent decision of the Supreme Court of the State of Texas, in *Magnolia Petroleum Company v. Railroad Commission of Texas et al.* (Sup. Ct.), 170 S. W. (2) 189, decided March 31, 1943, which holds that the State Raliroad Commission has control of the administration of the Texas Oil Conservation laws only and has nothing whatever to do with titles and that evidence bearing on whether or not title was set up before the Railroad Commission is inadmissible in a subsequent suit for title.

This is an important question of local law and a question on which much uncertainty will result from confusion in the decisions. From the decision in this case it is evident that great and irreparable loss of valuable property may occur by taking the wrong course. The question involved is far reaching in its application and importance. The decision of the Circuit Court of Appeals thus affects many oil operators.

(3) Petitioner sued for the strip described in respondents' deeds, the north line of which was the survey line fixed by Beavers (R. 3). On the trial (R. 214), it appeared that respondents contended that the north line claimed by them at that time intersected the West boundary line of the strip about 10 feet from its northwest corner and ran in a more or less straight line, slightly north of the wells claimed by them, to the southeast corner of the strip, thus leaving more than half of the strip outside of the land claimed by respondents. The findings of the lower court on which the judgment is based (R. 511) are that petitioner satisfied the burden of proof with reference to the portion of the strip north of the line contended for by respondents but rendered judgment against petitioner for the entire strip. (R. 513.) This was pointed out to the Circuit Court of Appeals in petitioner's original brief as well as in its motion for rehearing (R. 531), but has been ignored by the Circuit Court of Appeals and the judgment has been allowed to stand. Thus petitioner has been denied recovery of the portion of the land which the court found petitioner entitled to.

This is a matter of great and far-reaching importance affecting all litigants in the Federal Court. If judgment can stand against a litigant in whose favor the court has found, all litigation in the Federal Court is rendered meaningless.

In the accompanying brief of petitioner the issues and facts supporting petitioner's claims and contentions herein are more fully stated and considered and said brief is referred to in aid hereof.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Hon-

orable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to the Supreme Court of the United States for its review and determination on a day certain to be therein designated a full and complete transcript of the Record and of all proceedings in the said Circuit Court of Appeals in this cause; that the said decree of the said Circuit Court of Appeals in the said cause may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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